

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2007-0002

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY C.A. MACMILLAN REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY MCKINLEY
WESLEY, FOR STATE REPRESENTATIVE DIST. 64 CANDIDATE COMMITTEE**

The above-referenced case is before the Office of Administrative Courts on the complaint of C.A. MacMillan ("Complainant") against McKinley Wesley, State Representative Dist. 64 Candidate Committee ("Respondent" and/or "Respondent Committee"). On February 13, 2007, Complainant filed this complaint with the Colorado Secretary of State ("Secretary"). On February 15, 2007, the Secretary referred the complaint to the Office of Administrative Courts as required by Colo. Const. art. XXVIII, § 9(2)(a). This matter was referred to Administrative Law Judge ("ALJ"), Michelle A. Norcross, and a merits hearing was scheduled on March 2, 2007 in Denver, Colorado.

On March 2, 2007, Complaint appeared through counsel, Doyle Zakhem Suhre & Lilly, LLC. Neither Wesley McKinley nor the Respondent Committee appeared at hearing. On February 27, 2007, Dana Christie, the Respondent Committee's former registered agent, submitted two documents in response to the complaint: a copy of a letter addressed to Secretary Coffman and a copy of a Report of Contributions and Expenditures for the reporting period: October 26, 2006 – November 30, 2006.¹ On March 1, 2007, Complainant filed a Motion for Judgment on the Pleadings.² At the request of Complainant's counsel, the March 2 hearing date was vacated and the Motion for Judgment on the Pleadings was held for a response. In an order dated March 2, 2007, the Respondent Committee was notified that it had until March 14, 2007 to file a response to the motion. No response was received.

ISSUES PRESENTED

Complainant contends that Respondent violated § 1-45-108(2)(a)(I)(E), C.R.S. by failing to file a report of contributions and expenditures within thirty days of the 2006 general election. The ALJ must determine if Respondent violated this provision of the

¹ Ms. Christie is not a named defendant in the complaint. Moreover, as a non-attorney she cannot represent Mr. McKinley or the Respondent Committee in this proceeding. Therefore, the documents submitted by Ms. Christie on February 27, 2007 cannot and have not been considered as an answer to the complaint.

² Because the motion includes and incorporates the documents submitted by Ms. Christie on February 27, 2007, the ALJ is treating the motion as one for summary judgment.

Fair Campaign Practices Act (“FCPA”) and if so what are the appropriate remedies and/or penalties for such a violation.

FINDINGS OF FACT

1. Mr. McKinley was elected as a state representative for Colorado House District 64. According to the Secretary’s records, Respondent established and registered a candidate committee on April 8, 2002 under the name of McKinley Wesley, for State Representative Dist. 64. This name was also designated as the Respondent Committee’s name for purposes of the November 2006 general election. The Respondent Committee’s mailing address is: 200 Park Street, Springfield, Colorado 81073.

2. At all times relevant to this decision, Dana Christie was the registered agent of the Respondent Committee. Mr. McKinley, as the candidate, is, by definition, a member of the Respondent Committee. Aside from Mr. McKinley, there is no evidence establishing the identity of any other members of the Respondent Committee.

3 As a candidate committee, Respondent was required to file, among other things, a report of contributions and expenditures within thirty days after the 2006 general election. Thirty days following the November 6, 2006 election was December 7, 2006. Accordingly, Respondent had until December 7 to file this report manually or until December 9, 2006 to file it electronically. Respondent did not file the report by either date.

4. On December 26, 2006, the Secretary sent a letter to Ms. Christie, as the committee’s registered agent, informing her that the committee’s report had not been filed within thirty days of the date of the November 2006 election and further informed her that the report was now considered late.

5. Respondent did not file the report of contributions and expenditures for the reporting period: October 26, 2006 – November 30, 2006 with the Secretary until February 26, 2007, making the report eighty days late.

6. In a February 26, 2007 letter to Secretary Coffman, Ms. Christie admits that the report was filed “very late” and provides an explanation for why it was late. In sum, Ms. Christie’s explanation is that her schedule became very hectic and in December 2006 she encountered mounting work pressures, weather difficulties, holiday obligations, and family illness. Additionally, she adds, “The committee has expended most of the funds; therefore, because of these extenuating circumstances I am requesting a waiver of the fine.”

7. The ALJ does not find the circumstances set out in the February 26 letter to be “extenuating” or a valid basis for waiving the campaign filing requirements. Busy schedules, family obligations and weather delays can certainly cause delays; however, the ALJ finds no compelling evidence that the Respondent Committee made any

attempt to timely file its report or timely request an extension or waiver from the Secretary, even after receiving the Secretary's December 26 letter. The request for waiver was made nearly two months after the committee was put on notice that the report was late. Additionally, neither Mr. McKinley nor a legally authorized representative of the Respondent Committee appeared to defend the complaint at the March 2 hearing or responded to the Complainant's March 1, 2007 motion.

8. The undisputed facts establish that Respondent failed to file its report of contributions and expenditures within thirty days of the November 2006 general election, in direct violation of the election reporting requirements. And, that the report, when it was eventually filed, was eighty days late.

DISCUSSION

"Candidate committee" means, "a person, including the candidate, or person with the common purpose of receiving contributions or making expenditures under the authority of the candidate. A contribution to a candidate shall be deemed a contribution to a candidate's committee." Colo. Const. art. XXVIII, § 2(3). By definition, Mr. McKinley is a member of the Respondent Committee. There is no evidence establishing the identity of any other committee member.

Under § 1-45-108(1)(a)(I), C.R.S., all candidate committees must report to the appropriate officer their contributions received, expenditures made, and obligations entered into by the committee. This requirement includes filing a report of contributions and expenditures thirty days after the major election in election years. For purposes of this section, "election year" means every even numbered year for political parties and political committees and each year in which the particular candidate committee's candidate appears on the ballot. "Major election" is defined as the election that elects a person to that public office sought by the candidate committee's candidate. § 1-45-108(2)(a)(II), C.R.S.

It is undisputed that the Respondent Committee's contributions and expenditures report for the reporting period: October 26, 2006 – November 30, 2006, was not filed within thirty days of the November 2006 general election. It did not get filed until February 26, 2007, eighty days after it was due.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter.

2. If the ALJ determines that a violation of the FCPA has occurred, the ALJ's decision must include the appropriate order, sanction or relief authorized by Article XXVIII of the Colorado Constitution.

3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA), § 24-4-101, *et seq.*, C.R.S. Under the APA, the proponent of an order has the burden of proof. § 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against Respondent for violations of the FCPA. Accordingly, Complainant has the burden of proof.

4. The ALJ concludes that Complainant has established by a preponderance of the evidence that the Respondent Committee violated § 1-45-108(2)(a)(I)(E), C.R.S. by failing to file a report of contributions and expenditure within thirty days of the November 6, 2006 general election.

AGENCY DECISION

It is the Agency Decision of the ALJ that the Respondent committee violated § 1-45-108(2)(a)(I)(E), C.R.S. by failing to file the report of contributions and expenditures within thirty days of the November 2006 general election. Once a violation of the FCPA has been established, the ALJ must include in the Agency Decision the appropriate order, sanction, or relief authorized by Article XXVIII.

One sanction authorized for a failure to file pursuant to § 1-45-108, C.R.S. is a \$50 per day fine for each day the required filing was not made. See Colo. Const. art. XXVIII, § 10(2)(a). In accordance with § 10(2)(a), “[t]he appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to . . . sections 1-45-108, 1-45-109 or 1-45-110, C.R.S., or any successor sections, is not filed by the close of business on the day due.” The ALJ is not “the appropriate officer” for purposes of this section and is therefore not required to impose a \$50 per day sanction. Moreover, the Colorado Constitution permits the ALJ to set aside or reduce a penalty upon a showing of good cause. Colo. Const. art. XXVIII, § 10(2)(b)(I).

In this case, a strict application of the \$50 per day sanction in § 10(2)(a) would result in a \$4,000 fine (80 days @ \$50 per day). Under the circumstances of this case, the ALJ finds such a penalty warranted. The Respondent Committee was notified in writing by the Secretary on December 26 2006 that the report due on December 7, 2006 was late. There is no evidence that Respondent took any action in regard to that letter. It was not until February 26, 2007 nearly two months after the Secretary’s letter when the former registered agent finally filed the report. The people of the state of Colorado passed Amendment 27 in an effort to limit large campaign contributions to political candidates; eliminate the potential for corruption and the appearance of corruption; reduce the influence of election outcomes by wealthy individuals, corporations and special interest groups; and keep the cost of elections down allowing qualified citizens to run for political office. To this end, Colorado’s election laws are designed to limit campaign contributions, encourage voluntary spending limits, provide for full and timely disclosure of campaign contributions as well as independent expenditures and electioneering communications, and encourage strong enforcement of campaign

finance requirements. See Article XXVIII, § 1. Absent a showing of extenuating or extraordinary circumstances that prevented the timely filing of the final report of contributions and expenditures, the ALJ concludes that the Respondent Committee should be assessed the maximum daily penalty amount as set forth in § 10 of Article XXVIII.

Respondent is hereby assessed a \$4,000 penalty for untimely reporting. The penalty is to be paid in accordance with the requirements of the Secretary's rule, policies and procedures. This decision is subject to review with the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE and SIGNED

March 30, 2007

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

John S. Zakhem, Esq.
Doyle Zakhem Suhre Lilly, LLC
700 17th Street, Suite 2000
Denver, CO 80202

McKinley Wesley, State Rep. Dist. 64
200 Park Street
Springfield, CO 81073

and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 250
Denver, CO 80290

on this ____ day of April 2007
